

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
FLEMING COMPANIES, INC., <u>et al.</u> ,)	Case No. 03-10945 (MFW)
)	
Debtors.)	(Jointly Administered)
)	
)	Hearing Date: January 14, 2004 @ 2:00 p.m.
)	Objection Deadline: January 7, 2004 @ 4:00 p.m.
)	[Re: Docket Nos. 4538 and 4693]

**MOTION OF DIGIORGIO CORP. UNDER
11 U.S.C. § 107(b) AND FED. R. BANKR. P. 9018 FOR
AUTHORITY TO FILE AFFIDAVIT UNDER SEAL**

DiGiorgio Corp. (“DiGiorgio”), by its undersigned counsel, hereby moves this Court, under § 107(b) of the Bankruptcy Code, Rule 9018 of the Federal Rules of Bankruptcy Procedure, and Rule 5003-1(b) of the Local Rules for the United States Bankruptcy Court for the District of Delaware, for authority to file the affidavit of Lawrence Grossman (“Grossman Affidavit”) under seal. The Grossman Affidavit has been filed with the Court pursuant to the procedures set forth in Local Rule 5003-1(b). In support of this Motion, DiGiorgio respectfully states as follows:

Jurisdiction

1. This Court has jurisdiction to consider this Motion under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).
2. Venue for this case is proper in this district under 28 U.S.C. §§ 1408 and 1409.
3. Section 107(b) of the Bankruptcy Code, Bankruptcy Rule 9018, and Local Rule 5003-1(b) provide the basis for the relief sought in this Motion.

Background

4. On April 1, 2003, the Fleming Companies, Inc., *et al.*, (the “Debtors”) filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

5. On October 1, 1975, Blair Road Realty Corp. (“Blair”) leased to the Debtors the land and building (the “Premises”) known as 215 Blair Road, Woodbridge, New Jersey (the “Lease”).

6. On June 10, 1994, the Debtors subleased the Premises to DiGiorgio on a pass-through basis (the “Sublease”). As the Debtors acknowledged in the Assumption Motion, DiGiorgio timely has paid all rent owed to the Debtors under the Sublease, and the Debtors timely have paid all rent owed to Blair under the Lease.

7. On November 20, 2003, the Debtors filed a motion for an order authorizing the Debtors to assume and assign the Lease to DiGiorgio under § 365(a) and (f) of the Bankruptcy Code [Docket No. 4538] (the “Assumption Motion”).

8. On December 2, 2003, Blair filed an objection to the Assumption Motion, wherein Blair alleged, *inter alia*, that neither the Debtors nor DiGiorgio had established adequate assurance of DiGiorgio’s ability to perform its obligations under the Lease [Docket No. 4693].

9. At the December 8, 2003 hearing on the Assumption Motion, the Court granted DiGiorgio the right to file an affidavit to further establish adequate assurance of its ability to perform its obligations under the Lease. The information provided in the Grossman Affidavit further establishes adequate assurance of DiGiorgio’s ability to perform its obligations under the Lease but contains information that is confidential.

Relief Requested

10. DiGiorgio seeks entry of an order authorizing it to file the Grossman Affidavit under seal because the Grossman Affidavit contains confidential information regarding, *inter alia*, DiGiorgio's financial performance and ongoing profitability that cannot be disseminated to the general public.

Basis for Relief Requested

11. Section 107(b) of the Bankruptcy Code provides this Court with the power to issue orders that will protect entities, such as DiGiorgio, from potential harm that may result from the disclosure of certain confidential information. This section provides in pertinent part:

On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may—

(1) protect an entity with respect to a trade secret or confidential research, development or commercial information . . .

11 U.S.C. § 107(b).

12. Bankruptcy Rule 9018 defines the procedures by which a party may move for relief under § 107(b), and provides that “[o]n motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information . . .” Fed. R. Bankr. P. 9018.

13. DiGiorgio submits that this Court should grant the relief requested because the Grossman Affidavit contains the type of confidential commercial information intended to be protected by § 107(b) of the Bankruptcy Code. First, the Grossman Affidavit contains commercially sensitive financial projections and ongoing profitability data regarding DiGiorgio. Second, because DiGiorgio is a public company it may not disclose material non-public

information, prior to its public disclosure made in accordance with the Securities Exchange Act of 1934 and related regulations. Third, DiGiorgio should not be compelled to make public this confidential information to its competitors. When the information for which protection is sought fits into any of the categories specified in § 107(b), “the court is required to protect a requesting interested party and has no discretion to deny the application.” In re Orion Pictures Corp., 21 F. 3d 24, 27 (2nd Cir. 1994) (citation omitted) (emphasis in original). Good cause is not an element of § 107(b). “When congress addressed the secrecy problem in § 107(b) of the Bankruptcy Code, it imposed no requirement to show ‘good cause’ as a condition to sealing confidential commercial information.” Id. at 28. Thus, DiGiorgio requests authorization to file the Grossman Affidavit under seal.

14. No prior request for the relief requested in this Motion have been made to this Court.

[The remainder of this page was left intentionally blank]

WHEREFORE, DiGiorgio respectfully requests that the Court enter an Order, substantially in the form attached hereto, authorizing the filing of the Grossman Affidavit under seal.

Dated: December 22, 2003
Wilmington, Delaware

JASPAN SCHLESINGER HOFFMAN, LLP

By: /s/ Frederick B. Rosner
Frederick B. Rosner (No. 3995)
1201 N. Orange Street, Suite 1001
Wilmington, DE 19801
Telephone: (302) 351-8000
Facsimile: (302) 351-8010

-- and --

**FINKEL GOLDSTEIN BERZOW
ROSENBLOOM & NASH, LLP**

Neal M. Rosenbloom, Esq.
26 Broadway, Suite 711
New York, New York 10004
Telephone: (212) 344-2929
Facsimile: (212) 422-6836

Counsel for DiGiorgio Corp.